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Supreme Court of the United States

October Term, 1974

NO. 74-908

KERR STEAMSHIP CO., INC., ET AL,
Petitioners,

versus

THE CITY OF GALVESTON,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CIVIL APPEALS FOR THE FIFTH CIRCUIT

BENJAMIN R. POWEL
McLEOD, ALEXANDER, POWEL & APFFEL, INC.
808 Sealy & Smith Professional Building
P. O. Box 629
Galveston, Texas 77550
Tele. No. AC-713, 763-2481

Attorneys for Respondent

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

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To The Honorable Chief Justice and Associate Justices of The Supreme Court of The United States:

Respondent, The City of Galveston, opposes the Petition for a Writ of Certiorari to the Court of Civil Appeals for the Fifth Circuit, and prays that such Petition be denied.

QUESTIONS PRESENTED

1.

(Responding to Petitioners' Questions 1, 2 and 4)

Whether the provisions of the Tariffs of the City of Galveston (Galveston Wharves), as to definition of the types of charges and as to responsibility for charges, is consistent with and not violative of the Federal Maritime Commission General Order No. 15 (46 C.F.R., Part 533).

2.

(Responding to Petitioners' Question 3)

Whether the Court of Appeals, in affirming the judgment below, properly found the Tariff unambiguous and the Petitioners bound by the plain language of the Tariff.

STATEMENT OF THE CASE

Petitioners' Statement of the Case is essentially correct, with some exceptions. First, Petitioners were not sued "individually as steamship agents," as stated by Petitioners. Petitioners were merely named defendants, alleging that defendants placed, or caused to be placed, on the docks of the Wharves cotton pending export, and such cotton was allowed by Petitioners to remain on the Wharves beyond the free time, incurring pier demurrage for which Petitioners are liable.

Secondly, Respondent disagrees with Petitioners' statement that demurrage charges were all billed to the "vessel, its owners and agents". In fact, demurrage charges were

billed and mailed to Petitioners, at Petitioners' office address, in substantially the following form:

"M/V 'SAKISHIMA MARU' and Owners
Kerr S/S Co., Cotton Exch. Bldg., Galveston, Texas".

NATURE OF THE CASE

This is merely a collection suit filed by the Port of Galveston against local steamship company agents (one of whom is not only the agent but also owner and operator of a steamship line), where The City of Galveston, hereinafter called "City", collected demurrage charges accruing on outbound cargos of cotton bales under duly published Port Tariffs issued by the City and filed with the Federal Maritime Commission in December, 1967.

THE TARIFFS

On December 1, 1967 the Board of Trustees of the Galveston Wharves, acting on behalf of the City, issued Tariff Circular No. 4-D, which Tariff contains rates, services, rules, regulations, charges and responsibility therefor governing the operation of the City's public Port and Wharves' facilities, the particular portions thereof relevant to this controversy being Item No. 5(g) and (l), Item No. 30 and Item No. 185. (Appendix G, pp. A-37 through A-43) (All references to Appendix are to the Appendix to Petitioners' Petition for Writ of Certiorari).

Item No. 5 of the Tariff defines "free time" and "wharf demurrage"; Item No. 185 establishes the amount of "free time" and establiishes wharf (pier) demurrage-charge rates at 2½¢ per bale per day for the first five (5) days after free time and a 5¢ per bale charge per day for each day thereafter until removed, and further pro-

vides, in Paragraph (c)(1) that pier demurrage charges on outbound cargo will be considered as for the account and responsibility of the vessel, her owners or agents, individually or collectively. (A-37 through A-43).

Under Section 1, General Information, Rules and Regulations, Item No. 30, the Tariff provides generally for responsibility for charges and provides that those using the Port facilities agree to be governed by the Rules and Regulations contained in the Port's Tariffs (A-40).

AGENTS' USE OF THE PORT'S FACILITIES

The Petitioners were furnished copies of the City's Tariffs shortly after the Tariffs were filed with the Federal Maritime Commission in December, 1967, so actual notice to the Petitioners is not an issue. The Petitioners involved in this proceeding are some of the steamship company agents located at the Port of Galveston. All except Lykes Bros. Steamship Co., Inc., act as steamship agent for numerous vessels and owners which dock at Galveston; but Lykes Bros. also owns and operates its own vessels which received some of the cotton in question (FF 2).

BILLING PROCEDURE

It is difficult, if not impossible, for the City to determine responsibility for accrued demurrage on export cargo as between the vessel, the agent, the shippers and/or freight forwarders (F.F. 7). Billings for Port charges have been made by the City in the same manner as heretofore described in Respondent's Brief since at least 1954, and the billing is in accordance with the Tariff provisions outlined therein. Billings by the City for such charges are made after departure of the vessel loading cotton bales, and it would thus be difficult, if not impos-

sible, for the City to determine which party is responsible for the accrual of demurrage in every case (FF 7). Charging the agents is the only practical manner of billing these charges (F.F. 7).

TARIFF APPLICATION DURING STRIKE

The Tariff in force at the time in question did not provide for a reduction or exemption of demurrage charges in the event of a strike. The City could have charged the full demurrage charges accruing, irrespective of the strike, but reduced the charges during the term of the strike, to eliminate the "penalty" portion of the charges, resulting in reduced demurrage charges to the Petitioners. The Trial Court found that such reduction of demurrage charges was rational, reasonable, non-discriminatory and in accordance with Federal Maritime Commission cases and rules pertaining to the accrual of demurrage charges during a strike (FF 13). The City assessed strike demurrage charges uniformly to all users of the Port (City's Exhibit 7).

Petitioners, in the Appendix to Petition for Writ of Certiorari, have appended. as Appendixes H and I, respective portions of the Tariff of The City of Galveston and the Port of Corpus Christi not in effect at the time of accrual of the charges and not placed in evidence before the Trial Court, which portions of Tariffs are irrelevant and should not be considered by this Honorable Court, since the Trial Court had no opportunity to pass on same as evidence. In fact, Appendix I purports to be a portion of the Tariff of the Port of Corpus Christi, which was not even involved in the litigation below and which was issued more than five (5) years after the cause of action made the basis of this suit arose.

REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

1. The decision of the Trial Court below, affirmed by the Court of Appeals, is consistent with existing federal law and its application and interpretation by the Federal Maritime Commission, and presents no substantial federal question.

The Court below properly applied the plain language of the Tariff, to hold the Petitioners responsible for wharf demurrage charges.

The City, by reason of its operation of the Port of Galveston, is a marine terminal operator, as defined in Federal Maritime Commission Order No. 15 (46 C.F.R., Part 533), hereinafter referred to as "General Order No. 15", and, as such, even though not a common carrier by water, is required to duly publish and file its Tariffs with the Federal Maritime Commission. The City's duly filed and published Tariff is, therefore, aside from certain written Leases, the *only* instrument evidencing the myriad contractual responsibilities, duties and charges applicable between the City and literally hundreds of users of the Port. The Petitioners, as well as other agents, steamship companies, freight forwarders, shippers, importers and exporters, all operate in the Port of Galveston under its duly published Tariffs.

Petitioners below attacked the Tariffs, with regard to pier demurrage accruing in relation to the ILA strike, asserting that the charges for pier demurrage are not their responsibility, in spite of the fact that the Tariff clearly holds responsible for the charges the vessel, the owners and *their agents*, individually or collectively.

The Trial Court found, and the Court of Appeals affirmed, that the assessment of responsibility and thus liability under the Tariff is valid and enforceable.

The Tariff is consistent with and certainly not violative of General Order No. 15. General Order No. 15 requires only that marine terminal operators file rates, rules and regulations and charges with the Commission on or before their effective date; post their Tariffs of rates, rules and regulations at their place or places of business; and include in their Tariffs either the definitions of services set forth in Section 533.6 or other definitions, with appropriate explanations of how they differ from the definitions contained in General Order No. 15.

The definition of "wharf demurrage" and "free time" in the City's Tariff is identical to that prescribed by General Order No. 15.

The Commission's General Order No. 15 makes no other requirement of a Port's or marine terminal operator's Tariffs, other than they be timely filed with the Commission, in order to enable the Commission to discharge its responsibilities under Section 17 of the Shipping Act of 1916, by keeping informed of practices and rates and charges related thereto and be in a position to insure that the Tariffs and Port practices thereunder are just, reasonable and non-discriminatory.

Tariff provisions pertaining to billing procedures and the legal responsibilities of persons and agencies operating at the Port and using the Port facilities are left by the Commission to the Port to determine, establish and publish in the Port's respective Tariffs, always, of course, subject to review by the Commission, to insure that the rates, rules and regulations contained in said Tariffs are

just and reasonable, in accordance with Section 17 of the Shipping Act of 1916.

The Federal Maritime Commission has, in fact, in the past, specifically investigated in a formal proceeding the validity of the City's Tariff No. 4-B (predecessor of 4-D), in *Selden & Co. v. Trustees of Galveston Wharves,* 7 FMC 679 (1964), and the Commission found lawful a Tariff Amendment, whereby the City increased demurrage charges by mere publication of the Tariff providing for such increase, the Commission specifically holding that the Tariff Amendment issued and filed with the Commission was in effect and binding upon Selden & Co. The provisions of Tariff No. 4-B, affixing responsibiliy for charges accruing under said Tariff, are identical to the like provisions of Tariff No. 4-D, the former being construed and held enforceable and binding by the Federal Maritime Commission in *Selden & Co. v. Trustees of Galveston Wharves,* supra.

The Federal Maritime Commission appeared as Amicus Curiae in *Rorie v. City of Galveston,* 471 S.W.2d 789 (Tex. Sup. 1971), cert. den'd, 405 U.S. 988, 31 L.Ed.2d 454, in which the Texas Supreme Court held that the City's Tariff No. 4-B (predecessor of Tariff No. 4-D) was effective and enforceable upon the filing with the Commission. The theory advanced and rejected by both the Commission and the Courts, in *Rorie,* supra, was that the City of Galveston's Tariff constituted "an agreement", requiring formal Federal Maritime Commission approval, pursuant to Section 15 of the Shipping Act of 1916 (46 U.S.C. 814). The Court, in *Rorie,* like the Federal Maritime Commission in *Selden & Co.,* found the Tariff to be effective and enforceable upon filing with the Commission.

Petitioners urge that the mere filing of a Tariff does not make enforceable any part of the Tariff which is unlawful. Respondent has no argument with that statement; however, the Tariff in question has been found to be lawful by the Court in *Rorie v. City of Galveston*, by the Federal Maritime Commission in *Selden & Co. v. Trustees of Galveston Wharves*, and by the Courts below.

These holdings are certainly not in conflict with this Court's Opinion in *Boston & Maine RR v. Piper*, 246 U.S. 439, 62 L.Ed. 820 (1918). The Court, in *Piper*, considered an action by a cattle shipper against a rail carrier to recover for loss occasioned by carrier's delay in delivery of cattle resulting from carrier's negligence. Carrier defended on the basis of a special Contract with the shipper, limiting carrier's liability under the Cormack Amendment to the Interstate Commerce Act from loss caused by unusual delay, in consideration of shipping the cattle under a reduced rate.

This Honorable Court held that parties to a Bill of Lading involving an interstate shipment under Tariffs duly filed with the Interstate Commerce Commission are bound by the stipulations of the Bill af Lading and the filed Contract, and that the insertion of a limitation of liability provision in the Bill of Lading and Tariff by the carrier contravened the Cormack Amendment, providing that the carrier may not exonerate itself from its own negligence (with certain lawful exceptions). The Court did, of course, point out that the mere filing with the Interstate Commerce Commission of a Tariff containing an unlawful provision did not become lawful merely by reason of such filing.

The *Piper* case is irrelevant to the case at hand and clearly distinguishable. Piper and the B & M were parties to a Bill of Lading Contract involving an interstate shipment subject to the Interstate Commerce Act; the exculpatory or limitation of liability clause added by the rail carrier was prohibited by the Cormack Amendment to the Interstate Commerce Act. By comparison, the applicable portions of the City's Tariff do not involve an exculpatory clause; Petitioners and Respondent were not parties to a Bill of Lading Contract; and the City was operating only as a terminal operator, not as a common carrier.

The holding of the Court, in *Port of Tacoma v. SS DUVAL*, 364 F.2d 615 (9th 1966), though cited by Petitioners, does not support Petitioners' position. The Court, in *Port of Tacoma*, supra, merely held that provisions of a Port Tariff purporting to give the Port a lien did not give constructive notice of the lien provision of the Tariff to the owner of a vessel in derogation of the owner's no-lien rights under its Charter. The Port's lien provision contravenes the provisions of the Maritime Act, 46 USC, Sections 971-975; and, therefore, the owner's no-lien rights under its Charter, as provided in the Maritime Act, control. The case before this Court is substantially dissimilar to the *Port of Tacoma* case, supra, in that this case does not involve either constructive notice or assertion of a lien. The provisions of the City's Tariff as to responsibility for charges are not in violation of either the Maritime Act, the Shipping Act of 1916 or the Rules and Regulations of the Federal Maritime Commission.

Petitioners urge that Port terminal Tariffs are treated differently than common-carrier Tariffs. Respondent agrees

that there are certain differences, in that a Port's Tariff applies generally to all users of the Port whereas the carrier's Tariff applies to parties to a Bill of Lading Contract. A public Port, being a marine terminal, does not contract with each and every person using its services or wharf facilities, but merely issues its Tariffs, outlining the rules and regulations, charges and responsibilities, therefor, which apply uniformly to all persons availing themselves of the public Port facilities.

Cases involving common carrier liability under Tariffs filed pursuant to the Interstate Commerce Act are not necessarily binding on Federal Maritime Commission rules regarding marine terminal operators. *American Export-Isbrandtsen Lines, Inc. v. Federal Maritime Commission,* 444 F.2d 824 (C.A. D.C. 1969).

The enforceability of marine terminal operator Tariffs in the same manner as Tariffs of common carriers was discussed in *State of Israel v. Metropolitan Dade County, Florida,* 431 F.2d 925 (C.A. 5th 1970), which was a case involving suit by a marine terminal operator against a vessel owner for dockage charges. The Court said:

> "As with taxes, we start with the proposition that morality, equity or the invidious reflex of each has no part in Tariff application. A Tariff required by the appropriate regulatory statute (CFR Secs. 532.2, et seq., 1970), like the law of the Medes and Persians, which alterath not, is more than an essential Contract. *It has the force of law with the analogous dignity of a statute.* (Emphasis added) *Venezolana De Navegacion v. A. J. Perez Export Co.,* 303 F.2d 692 (C.A. 5th 1962), and see especially Note 12, 1962 AMC 1710, cert. den'd., 371 U.S. 942, 9 L.Ed.2d 276".

2. The Court of Appeals, in affirming the judgment below, properly found the Tariff unambiguous and the Petitioners bound by the plain language of the Tariff.

Petitioners go to great lengths to try to create in the minds of the Court an ambiguity in the Tariff, where none exists, to escape liability for these demurrage charges. Petitioners apparently urge that the definition of wharf demurrage under Item 5 of the Tariff assesses liability and responsibility for demurrage charges upon the owners of the cotton, even though Item 5 merely defines the service for which a charge is made and even though, as a practical matter, it would be impossible for the Port of Galveston to know what particular person or company owned the cotton at any given time. The City of Galveston is not privy to Sales Contracts and Agreements between shippers and ultimate consignees of export cotton and obviously has no way of knowing when title and thus ownership to to cotton has passed.

The Trial Court properly found that the disputed Tariff items are unambiguous. The Trial Court found, as a conclusion of law, that, under the Tariff, pier demurrage charges for cargo remaining beyond free time may be assessed against the vessels and their agents. The Trial Court further found, as a conclusion of law, that the definition of pier demurrage in Item No. 5 of the Tariff deals only with the manner in which charges are accrued, and does not purport to establish which parties are liable for the charges, finding such Items neither conflicting nor ambiguous (C/L).

The Courts below, therefore, merely applied the clearly stated language of the Tariff. Item No. 5 merely *defines*

pier demurrage as a charge assessable against the cargo and does not speak to the question of liability or ultimate responsibility for the charges. Item No. 5 of the Tariff merely defines the *basis for the accrual* of said charges. Item No. 30 of the Tariff, however, provides, under the subject "Responsibility For Charges, Etc.", that the use of the waterways and facilities of the City's Port facility shall constitute a consent to the terms and conditions of the Tariff and an agreement on the part of the vessels, their owners and agents, and other users of the facility, to be governed and bound by the rules and regulations contained in the Tariff. Particular responsibility for pier demurrage charges is provided under Section 2, "Subject Rules and Charges", Item 185(c)(1), to-wit:

> "Pier demurrage charges on outbound cargo will be considered as for the account and responsibility of the vessel, their owners or their agents, individually or collectively".

Respondent acknowledges the general rule of construction in favor of shippers pertaining to carrier's Tariffs, which, in general, apply to ambiguously stated commodity descriptions and rate application. For example, in *United States v. Gulf Refining Co.*, 268 U.S. 542, 69 L.Ed. 1082 (1925), this Court considered a case in which Gulf Refining was convicted of receiving concessions and discriminating in rates on gasoline shipped, in violation of the Elkins Act of 1903 (providing that it be unlawful to discriminate or receive rebates from filed Tariff rates). The question there involved was a description of the commodity shipped, i.e., whether "unrefined naptha", commanding a lower rate, or "gasoline", commanding a higher rate.

The Court held that, where a commodity is included in more than one Tariff designation, that designation which is more specific will be held applicable. The Court further held that where two descriptions of commodities in a Tariff are equally appropriate, the shipper is entitled to have applied the description specifying the lower rate.

Atlantic Coast Line RR Co. v. Atlantic Bridge Co., 57 F.2d 654, (C.A. 5th 1932), is also a rate case, involving the classification of a commodity shipped as falling under different Tariff classifications, with responding differences in rates. The shipper obtained an Interstate Commerce Commission Reparation Order, which Reparation Order was affirmed and enforcement ordered by District Court. To the railroad's appeal, the Court said:

> "Tariffs, like statutes, have the force of law. Like statutes, they must be expressed in clear and plain terms, so that those dealing with and governed by them may understand them and act advisedly. They may not be contrived in catch-penny terms to catch the ignorant and unwary. If they are ambiguous or permit of two meanings, the shipper may construe them in the most favorable way to himself which the terms permit. The intention thus manifested in the words of the Tariff is *alone* the intention to which the law gives effect".

The Court found that the classifications, as used in the Tariff and applied to the commodities shipped, dictated against the carrier's position, irrespective of the carrier's intent.

Respondent has no argument with these cases and their holdings. The Courts below found neither conflict nor ambiguity in the City's Tariff. The subject matter does

not involve the question of application of varying rates to particular commodities. Thus, the cited Tariff construction cases are just not authoritative for the construction proposition advanced by Petitioners.

Petitioners claim agency insulation from liability on the grounds that the Petitioners were not parties to Bills of Lading covering the cotton cargo on the Wharves and that Petitioners were acting for disclosed principals. The fact that Petitioners are not parties to any Bill of Lading Contract concerning cargo on the Wharves is immaterial. Respondent City, likewise, is not party to any Bill of Lading Contract pertaining to the goods on its Wharves, and does not rely upon any Bill of Lading provision for the enforcement of its marine terminal Tariff, since Respondent is not acting as a common carrier in regard to furnishing wharf and pier facilities at its Port.

Petitioners failed to prove and failed to secure Finding of Fact that, with regard to the demurrage bills sought to be collected by the City, Petitioners disclosed to the City any particular principal for whom each Petitioner purported to act as agent at or prior to the time that the demurrage charges accrued, and, therefore, the City was not furnished knowledge of any particular agency relationship. Mere proof that Petitioners, other than Lykes Steamship Co., Inc., which acted in its own behalf, generally represented steamship companies or vessels is not sufficient to show that Petitioners disclosed the principal for which Petitioners purported to act in arranging for the berth and use of the wharf space for cotton.

In any event, the theory of insulation of the Petitioners on the disclosed principal theory is immaterial, since the City's Tariff specifically and particularly holds the vessel,

its owners and agents, individually and collectively, responsible for the accrual of pier demurrage charges on outbound cargo.

That portion of the City's Tariff establishing responsibility for charges is lawful. The procedure of billing the Petitioners-Agents who arranged for the use of the Wharf facilities has been followed at the Port of Galveston since 1954. The Trial Court found that it would be difficult, if not impossible, for Respondent to determine which party is responsible for the accrual of demurrage in every instance; that determining which shipper owned a particular cargo would be time consuming; and that charging the Petitioners is the only practical manner of billing the expense (FF 7). The City's Tariffs are uniformly applied to all who use the City's port facilities, and the City has not discriminated in applying its duly published and filed Ttriffs. Therefore, the Tariff, until changed or modified, binds all parties with the force of law. *River Terminals Corp. v. Southwest Sugar & Molasses Co.*, 253 F.2d 922 (5th Cir. 1958).

The Federal Maritime Commission, which is vested with primary jurisdiction to review, interpret and, when necessary, to order Amendment or Modification of Tariffs filed with it, in *Selden & Co. v. Trustees of Galveston Wharves*, supra, held to be effective and binding the language in a predecessor Tariff, identical to Item No. 30 in the present Tariff. Further, the Commission, by reason of its Amicus Curiae Brief in *Rorie v. City of Galveston*, supra, had another opportunity to review the City's Tariff, and reasserted the Commission's view that Section 15 of the Shipping Act does not apply to the City's Tariff.

Although the Courts are the final authority on issues of statutory construction, *FTC v. Colgate-Palmolive*, 380

U.S. 374, 385 (1965), the construction put on a statute by an agency charged with administering it is entitled to deference by the Courts. *NLRB v. Hearst Publications*, 322 U.S. 111, 131 (1944).

Respondent has no quarrel with the holdings of Petitioners' cited cases of *Louisville & Nashville RR Co. v. Maxwell*, 237 U.S. 94 (1915), or *Lowden v. Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516 (1939). These cases merely hold that, until changed, Tariffs bind both carriers and shippers with the force of law.

Middle Atlantic Conference v. United States, 353 F. Supp. 1109 (D.C. D.C. 1972), is *not* a decision directly responsive to this Tariff question, and does *not* directly apply to the circumstances in the instant case. The *Middle Atlantic Conference* case considers the right of a common carrier, a party to a Bill of Lading Contract, to extend liability beyond the parties to the Bill of Lading Contract (i.e., warehousemen, brokers, pier operators, etc., for detention charges on trucks being loaded and unloaded at the premises).

The District Court there considered an appeal from an Order of the Interstate Commerce Commission, construing a ruling of the Interstate Commerce Commission on a proposed extension of liability for charges in a motor carrier's Tariff to apply to parties not privy to the Bill of Lading Contract, the Commission applying the provisions of 49 U.S.C. Sec. 317(a).

The Commission ordered, and the Court affirmed, that the insertion of Tariff provisions of motor and rail carriers attempting to place liability for detention charges on persons not parties to the Contract of transportation is unlawful. The *Midatlantic Conference* case, supra, is just not

authority on the question before this Honorable Court. The City is merely a terminal operator and not a common carrier or party to a Bill of Lading Contract. The Port is subject to the primary jurisdiction of the Federal Maritime Commission under the Shipping Act of 1916, whereas the carriers in the *Midatlantic Conference* case, supra, are bound by the provisions of the Interstate Commerce Act. The Court further recognized that, in transportation Contracts of rail and motor carriers, the Contract of carriage is directly with the shipper, unlike maritime demurrage. The City, as a marine terminal operator, has no direct contact with shippers, is not party to any Bill of Lading Contract for transportation of goods, and has, as its only instrument evidencing rates, charges and responsibilities of persons using the public Port, its duly filed and published marine terminal Tariffs.

Petitioners even complain of the City's elimination of the "penalty" portion of the pier demurrage during the ILA strike, which resulted in a considerably lesser amount of demurrage being owing by Petitioners than if the "penalty" poriton of the pier demurrage charges would have been assessed during the duration of the strike. The Trial Court found, and the Court of Appeals affirmed, that Respondent's assessment of reduced rates during the strike, even though under the Tariff Respondent could have charged demurrage at the usual, gradually increasing rate, was rational, reasonable and non-discriminatory (F.F. 12 and 13).

The City's elimination from its Tariff charges of the "penalty" portion of its demurrage rate, charging only the "compensatory" portion of the demurrage rate was found to be reasonable by the Trial Court. The City is required by law to charge and collect demurrage charges which are

compensatory. *California v. United States*, 320 U.S. 577, 88 L.Ed.322 (1944). However, the Federal Maritime Commission has, since 1948, held that a terminal operator, such as the City of Galveston, shall charge the compensatory portion of its demurrage rates which accrue during the period when the Port is struck, but shall not charge the penalty portion of the demurrage rate. *Free Time and Demurrage Charges—New York*, 3 USMC 89 (1948). In *Free Time and Demurrage Charges — New York*, supra, the Commission said that demurrage charges have:

> "a dual composition, consisting of an element of compensation for the storage of property, and an element of penalty to induce its removal. . . . When property lies at rest on a pier after free time has expired, and consignees, through reasons beyond their control, are unable to remove it, the penal element of demurrage charges assessed against such property has no effect in accelerating clearance of the pier. To the extent that such charges are penal, i.e., in excess of a compensatory level, they are useless and subsequently unjust burdens upon consignees and a source of unearned revenues to carriers. The levying of such penalty charges, therefore, constitutes an unjust and unreasonable practice in connection with the storing and delivering of property, and should be forbidden".

Accordingly, the City's reduction of its demurrage charges during the strike period to eliminate the "penalty" portion of the charge was found by the Court to be not only rational, reasonable and non-discriminatory, but such reduction of demurrage charges by the City was in accordance with the legal precedent established by the Federal Maritime Commission.

CONCLUSION

WHEREFORE, the ruling of the Trial Court and affirmation by the Court of Appeals being in accordance with established Federal law and the regulations and rulings of the Federal Maritime Commission, and no substantial Federal question having been presented in the Petition for Writ of Certiorari, Respondent respectfully prays that Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be denied.

Respectfully submitted,

BENJAMIN R. POWEL
McLEOD, ALEXANDER, POWEL & APFFEL, INC.
808 Sealy & Smith Professional Building
P. O. Box 629
Galveston, Texas 77550

Attorneys for Respondent, The City of Galveston

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Civil Appeals for the Fifth Circuit has this _____ day of February, 1975, been forwarded to the Attorney for Petitioners, Mr. Robert Eikel, Messrs. Eikel & Davey, 1442 Esperson Building, Houston, Texas 77002, Certified Return Receipt Requested.

BENJAMIN R. POWEL